

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1196

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

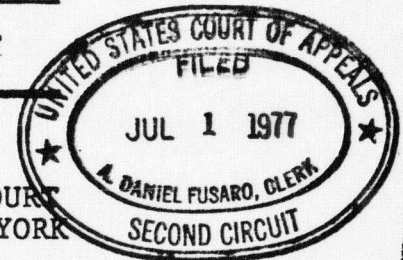
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UNITED STATES OF AMERICA,
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:
Plaintiff-Appellee,
:
:
-against-
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:
CHARLES RUSSO,
:
:
Defendant-Appellant.
:
:
-----X

B 9/3

Docket No. 77-1196

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CHARLES RUSSO
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
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PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

TITLE OF CASE		ATTORNEYS			
THE UNITED STATES		For U. S.:			
vs.		George Parry, Esq.			
SALVATORE RUSSOTTI a/k/a "Red"; SALVATORE GINGELLO a/k/a "Sammy G"; CHARLES RUSSO; PAUL CONEOR		(Pending)			
Conspiracy to conduct, finance, manage, supervise, direct and own an illegal gambling business, involving a dice game, (Ct. 1), in violation of Section 371, Title 18, U.S.C.; Unlawfully did conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of an unlawful dice game, (Ct. 2), in violation of Section 1955, Title 18, U.S.C.		For Defendant:			
		(1) Peter J. Connelly, Jr.			
		XXXXXX			
		(2) Charles McDoneagh, Esq.			
		(3) Robert Walsh, Esq.			
		(4) Robert Walsh, Esq.			
		(2) Samuel J. DiGaetano, Esq.			
Offenses: 1/20/73-4/20/73 2 Cts.					
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title 18					
Sec. 371, 1955					
PROCEEDINGS					
DATE					
June 28	Filed Indictment				
June 28	J.S. 2 made				
July 26	Defts. being duly arraigned, enter pleas of not guilty to the Indictment. Adj. to 8/8/1973 for oral argument on any motions				
Aug. 7	Filed Deft. Salvatore Russotti's notice of motion for bill of particulars; discovery, inspection and disclosure; strike surplusage from the indictment; and etc. - ret. 8/8/1973				
Aug. 8	Return date for motions. Court will set date for a hearing on motions. The Court directs that all motions filed in Cr-1973-176 are to be included in Cr-1973-256.				
Oct. 19	Suppression hearing. Hearing Adj. to a time to be determined by the Court.				
Nov. 12	Filed Ct. Steno's transcript of testimony of Witness Graham J. Desvernine, taken on Oct. 19, 1973.				
Dec. 14	Filed Govt's suppl. answer to Defts. motions				
17	Motion by Deft. Gingello to delete from title on Indictment "Sammy G". Motion by all defts. for a bill of particulars. Motion by all defts. to suppress tapes. All motions decisio reserved.				

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PROCEEDINGS

197

Jan. 7 Filed Govt's answer to further motions of Deft. Russotti

Jan. 7 Filed Decision and Order that the motions of defts. for a pretrial hearing on Joseph Zito denied. If such a hearing is necessary, it may be held at the trial, either in or out of the jury's presence, depending upon the circumstances. Defendants' motion to delete the aliases as to the defts. is denied, etc.; Defts' motion for a further bill of particulars etc., denied. Further proceedings are adj. to 1/31/1974. CURTIN, J.

Jan. 22 Filed notice of motion by Defts. Charles Russo and Paul Comfort, for the ret. to the Defts. Charles Russo and Paul Comfort, of all materials, evidence, and items seized pur. to a Search Warrant dated 4/20/1973, for the premises designated 120-124 Webster St., Rochester, N.Y., etc., ret. 1/31/1974.

Jan. 31 Motion by Deft. Comfort to return seized materials. Govt. informs Court property has been returned to the deft.

Feb. 6 Filed Order that all evidence, materials and items seized pur. to a search warrant dated 4/20/1973, for the premises designated 120-124 Webster St., Rochester, N.Y., be returned forthwith by the Govt. to the Defts. Charles Russo and Paul Comfort--CURTIN, J.

Feb. 14 Filed Marshal's ret. on Order returning material seized from defts. Russo and Comfort, executed 2/14/1974

Sept. 30 Determination of counsel for deft Gingello. Adj. to 10/15/74

Oct. 15 Determination of counsel for deft. Gingello. Adj. to 10/29/74.

1975

Jan. 13 Adj. only for deft Gingello to 1/27/75 for return of motions. Govt. must respond by 2/3/75. Argument on motions will be 2/3/75, if necessary

Jan. 24 Filed Govt's motion for appropriate relief

Jan. 27 U.S. vs. Salvatore Gingello - Return date for motions. Govt. to file memo by 2/10/75

Jan. 29 Filed copy of letter to defense counsel from Robert Stewart, Atty.-in-Charge Strike Force, dated 1/28/75 (filed in Cr-1973-96)

Feb 3 Re: Salvatore Gingello. Govt's response to deft's motions. Court info Govt that he will meet with George Parry, Esq. re this matter.

Feb. 10 Filed Govt's memorandum (Copy-- filed in Cr-1973-96)

Feb 10 Return date for Govt's brief. Brief to be filed today.

Feb. 14 Filed Govt's motion for pre-trial determination of the accuracy of a transcript

Feb. 14 Filed Letter from Lloyd George Parry, Department of Justice Atty., to dated 2/11/75 - in regard to setting a date for determination of the accuracy of a tape transcript, etc.

Feb 18 Motion by the Govt for appropriate relief. Motion denied.

Feb 18 Return date for Govt's memo. Submitted. (Re: Salvatore Gingello)

1976

Pre-trial conference held. Adj. 3/22/76 to set a trial date and to determine Samuel DiGaetano will be able to appear at trial for deft. Gingello

Mar. 2 If not, Gingello is to appear with new counsel.

Mar. 22 Determination of counsel and set date for trial. Robert Walsh, Esq., Edward Seddens only appearances; Atty. Samuel DiGaetano communicated with the court by telephone and advised that he will continue to represent deft. Gingello and that he would be ready

PROCEEDINGS

CLERK'S FEES

PLAINTIFF

DEFENDANT

3

1976			
22	for trial some-time during the month of may		
9	Filed Pet. for Writ of H.C. Ad Proseq. for Deft. Paul Comfort for trial, ret. 6/15/76-Buffalo		
15	Filed Deft. Russotti's notice of motion for an order granting a hearing for the purpose of determining whether the tape of 4/12/73 and the transcript thereof should be suppressed, etc.		
15	Govt. moves case ready for trial before Judge Curtin, at Buffalo, N.Y. whereupon Samuel DiGaetano, Esq., makes application to the Court to be relieved as counsel for deft. Salvatore Gingello for reasons of health. Deft. Gingello present in Court. Application is granted. Patrick Baker, Esq., counsel for Harold Boreanaz, informs the Court Mr. Boreanaz is now counsel for Mr. Gingello. Proceedings are adj. until 8/2/76, at which time there will be a hearing on tapes. Hearing is to determine consent to taking and audibility. dated 6/9/76		
June 18	Filed cy. of letter from Lloyd George Parry, Dept. of Justice Atty., to all defense counsel, requesting a clarification of defense's position with respect to the suppression of the tape which was consensually recorded through Mr. Zitto and the transcript of that tape, and etc. It is the Government's position that this issue should be decided before jury selection and that a motion to suppress as to either the tape or the transcript after jury selection would not be timely.		
June 28	Filed Writ of H.C. Ad Proseq., for Paul Comfort - executed 6/21/76		
Aug. 4	Filed Pet. & Order for Writ of H.C. Ad Proseq. for Paul Comfort, for a suppression hearing - 8/2/76-- ERTIXXX ELFIN, J.		
Aug. 2	Hearing to establish audibility of tapes and correctness of the transcript. Witnesses for the Govt.: Joseph Zito. Court directs that all defense motions are to be filed by August 16, 1976, and the Govt. is to reply by 8/30/76. Tentative trial date is set for 10/26/76		
Aug. 12	Filed Pet. & Order for Writ of H.C. Ad. Prosequ., and Writ, executed 8/2/76		
Aug. 16	Status report xxx No appearances for deft. xxx Govt. advises court they are awaiting the trial in state court of the same deft. This case, by agreement is to follow Adj. to 11/15/76 for further status reports		
Aug. 16	Return date for filing motions. Adj. 8/20/76 at request of deft. Gingello.		
Aug. 23	Return date for motions by Deft. Gingello. Motion filed - Govt. to respond.		
Oct. 4	Filed deft. Paul Comfort's notice of motion for dismissal, or in the alternative a severance, etc., ret. 10/12/76		
Oct. 12	Return date for motions. Adj. to 10/26/76 by consent. Re- Paul Comfort		
Oct. 27	Filed Order that the Government is to respond to Deft. Paul Comfort's motion by 11/8/76. Trial of this action will commence on		

		PLAINTIFF	DEFENDANT
Oct. 27	1/4/1977 at 9:30, etc., CURTIN, J.		
Oct. 26	Return date for motions of Deft. Comfort. Motions filed. Adj. to 11/8/76.		
Nov. 8	Filed Govt's answer to defendant Comfort's motion to dismiss the Indictment.		
Nov. 8	Government response to deft. Paul Comfort's motion. Response to be filed today. Court will set date for Oral Argument. (See entry above entry re Govt's response)		
Dec. 21	Filed order denying deft's motion to dismiss, but granting deft Comfort's motion for severance is granted. CURTIN, J.		
Dec. 29	Filed petition of writ of Habeas Corpus Ad Prosequendum for deft's Russotti, and Gingello.		
Jan. 4	Filed three subpoenas - Sol Sharfstein. Served 12/28/76. Frank Ferrara, & Joseph Salerno served 12/29/76. Filed one subpoena - Michael Lapani returned no service.		
1977			
Jan. 4	Upon application to the court and with the consent of the deft., Peter Connolly is discharged and Harold Boreanaz is representing deft Gingello in this case. Govt. moves case ready for trial, whereupon, the jury is empanelled. Trial to resume at a time to be determined by the Court.		
Jan. 6	Filed subpoena - Joseph Randazzo - served 12/30/76		
Jan. 27	Filed Ct. Steno's transcript of proceedings held before Judge Curtin on 8-5-76.		
Feb. 8	Trial continues from 1/4/77 with same appearances & Jury. Witnesses testify. Trial is adj. until tomorrow, 2/9/77.		
Feb. 9	Trial resumes from yesterday with same appearances & jury.		
Feb. 10	Trial continues from yesterday with same appearances & jury. Trial adj. until tomorrow.		
Feb. 11	Trial continues from yesterday with same appearances & jury. All de move to dismiss the Indictment. Decision reserved. Trial adj until 2/15/77.		
Feb. 15	Trial continues from Friday, Feb. 11, 1977 with same appearances and Jury. Trial is adj. until tomorrow.		
Feb. 15	Filed further stipulation re electronic recording surveillance by FBI		
Feb. 16	Trial continues from yesterday with the same appearances and jury. The jury retires to deliberate upon their verdict. The Jury returns with the following verdict: Defts' Russotti, Gingello, XXXXX - Not Guilty on Count One; Deft. Russo - Guilty on Count One; Count Two - Deft. Russotti - Not Guilty; Deft. Gingello - Not Guilty - Deft. Russo - Not Guilty. The jury is polled on Count One at the request of deft. Russo. The jury is excused. Bail is continued on Deft. Russo. Sentence is deferred 3/28/77.		

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

SALVATORE RUSSOTTI a/k/a "Red"
SALVATORE GINGELLO a/k/a "Sammy G"
CHARLES RUSSO
PAUL COMFORT

MARCH 1973 SESSION

Term x

No.

Vio. 18 U.S.C. Section 371
18 U.S.C. Section 1955

FILED:

CR-1973-256

COUNT I

The Grand Jury Charges:

THAT continuously between January 20, 1973 and April 20, 1973, in the Western District of New York, SALVATORE RUSSOTTI a/k/a "Red", SALVATORE GINGELLO a/k/a "Sammy G", CHARLES RUSSO and PAUL COMFORT, defendants herein, and JOSEPH ZITO, JOSEPH SALERNO and SOL SHARFSTEIN, named herein as co-conspirators, but not indicted as defendants, and others, did unlawfully and knowingly conspire, combine and agree together and with each other to conduct, finance, manage, supervise, direct and own an illegal gambling business, involving a dice game which violated the provisions of Article 225 of the Penal Law of the State of New York, in violation of Section 1955 of Title 18 of the United States Code:

OVERT ACTS

And, during the period aforesaid, the said defendants and the said unindicted co-conspirators committed the following overt acts in furtherance of the said conspiracy and in order to effectuate the object and purpose thereof, to wit:

1. On April 9, 1973, CHARLES RUSSO and PAUL COMFORT supervised the operation of a dice game at 124 Webster Street, Rochester, New York.

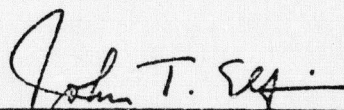
2. On April 12, 1973, SALVATORE RUSSOTTI a/k/a "Red" and SALVATORE GINGELLO a/k/a "Sammy G" met with JOSEPH ZITO at 124 Webster Street, Rochester, New York.

All of the above in violation of Title 18, United States Code, Section 371.

COUNT II

The Grand Jury Further Charges:

THAT continuously between January 20, 1973 and April 20, 1973, in the Western District of New York, the defendants, SALVATORE RUSSOTTI a/k/a "Red", SALVATORE GINGELLO a/k/a "Sammy G", CHARLES RUSSO, and PAUL COMFORT, unlawfully did conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of an unlawful dice game which violated the provisions of Article 225 of the Penal Law of the State of New York, and which involved more than five persons unlawfully conducting the said dice game, all of which was in violation of Section 1955 of Title 18 of the United States Code.



JOHN T. ELFVIN
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

A TRUE BILL:



FOREMAN

1 PROCEEDINGS: February 16, 1977, 10:00 a.m.

2 APPEARANCES: As before noted.

3 (Defendants present.)

4
5 THE COURT: The defendants are here. Could you
6 have the jury come up, please.

7
8 (Jury returns to the courtroom.)

9
10 THE COURT: All the jury is in attendance. The
11 defendants and their counsel are here
12 and at this time, I will charge you on
13 the issues which you will have to decide
14 in this case. This courtroom, ladies
15 and gentlemen, we keep working on it,
16 and I, frankly, cannot understand it, but
17 we have a lot of difficulty with the air
18 here. It really is oppressive and it
19 is hard to work in and we keep going back
20 to the GSA and we wonder how they can
21 send men to the moon and yet, we cannot
22 have a room where the air your breathe
23 does not put you to sleep in five seconds.
24 They have some kind of miracle stuff
25 that they have in our air conditioning

1 system which we have to fight with all
2 the time.

3 As the lawyers have pointed out,
4 Congress has decided to make a complicated
5 bit of legislation here which we have to
6 wrestle with. Therefore, it is not, -
7 I cannot make it simple. I just cannot
8 say to you that as in a negligence case,
9 if they are careless and you find
10 liability that is it. Here there are
11 certain elements that must be satisfied
12 and, therefore, I must discuss a number
13 of these elements. I am going to try
14 to be just as much to the point as I
15 possibly can, but it is necessary that
16 I touch every point and, therefore, I
17 know that you will be patient and bear
18 with me just as you certainly have been
19 patient and listened carefully to the
20 attorneys in their summations.

21 In this case, as in any criminal
22 case, there are certain general basic
23 rules which we must follow. Many of them
24 we have talked about before, but it is
25 well if we discuss them briefly again here

1 this morning. The fact that there is an
2 indictment, as you well know, is not any
3 evidence of any criminal conduct on the
4 part of any one of the defendants. The
5 purpose of an indictment is to tell a
6 man what he is charged with so that he
7 can prepare his defense and so that he
8 will not be charged again a second time.

9 Each defendant in this case is pre-
10 sumed innocent. That presumption still
11 remains with him and is not overcome
12 until and unless all of you jurors
13 unanimously say "Well, on this particular
14 count, we find beyond a reasonable doubt,
15 that the elements are satisfied and that
16 he is guilty", and you come in and by
17 your foreman, announce in open court,
18 "Guilty". Then the presumption is over-
19 come, but not until that time.

20 A few housekeeping details. It is
21 a good idea when you go to the jury room
22 and before you begin your deliberation,
23 to select one of your number as the fore-
24 man of your group, a person who can sort
25 of be the chairman of your proceedings.

1 He is equal among all the rest of you
2 as far as voting is concerned, but some-
3 one who can simply perhaps guide the
4 discussion more to keep tally, keep
5 count and also if there is a question
6 which comes to your mind that he can
7 write out the question, give it to the
8 Marshal who will deliver it to me so that
9 we can have you come into court so that
10 question can be resolved here in open
11 court. He should not try to solicit
12 answers from anyone else about your
13 duties except in this manner. Only by
14 note to the Marshal to be delivered to
15 the Court. If you do come into court,
16 do not tell me how you stand numerically
17 for or against guilt or innocence in
18 these cases, until you have arrived at
19 a unanimous verdict.

20 Certainly, it goes without saying
21 that it is your job to deliberate care-
22 fully. That means that you should give
23 to your fellow jurors, your ideas, your
24 suggestions, your view of the evidence,
25

1 your view of the credibility of the
2 witnesses and how one witness stacks up,
3 his testimony with that of another. On
4 the other hand, it is also your job to
5 listen carefully to the conscientious
6 reasoned views of your fellow jurors, to
7 listen carefully and if you believe that
8 their analysis bears more sense than yours,
9 then you should accept it. You should not
10 accept it for any petit reason, any reason
11 of bias or prejudice and you should not
12 offer any argument here based upon bias
13 or prejudice, or any other improper
14 motive. You know that the judgment in
15 this case is to be based upon the evidence
16 and the evidence alone. Considerations
17 of sympathy are not to enter into your
18 deliberations. Considerations of possible
19 sentence is not your concern. The law
20 provides that it is the jury's job to
21 determine guilt or innocence. It is the
22 Court's job after a presentence report
23 and investigation to determine sentence.
24 Each has our own job here and we must
25 each carry out our task to the best of
our ability. It is your task to deter-

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1 mine the facts. If I discuss the facts
2 here in the case and I seem to give a
3 little more emphasis to one fact rather
4 than another and you do not agree with
5 me, that is your prerogative. You
6 determine the facts.

7 I charge you on the law and then
8 you taking the law and the facts together,
9 arrive upon a verdict.

10 In this case, there are two counts
11 and each defendant is charged in each
12 count. You should take up each count
13 as to each defendant separately and,
14 therefore, you may arrive at different
15 verdicts. You may find all the defendants
16 not guilty or you may find all of the
17 defendants guilty or you may find any
18 mix, depending upon what your analysis
19 leads you to, but it is important that
20 you consider each count separately.

21 The law, as the attorneys have
22 analyzed, and I think they did a good
23 job of analyzing the facts and the law
24 from their own point of view, the law
25 is different. The one count, Count 1

1 involves a conspiracy. That is a plan to
2 do an unlawful act, the agreement to do
3 an unlawful act.

4 Count 2 has to do with the doing,
5 the completion of an unlawful act so that
6 you may find, for example, that a defendant
7 did something which was unlawful under
8 Count 2, but he did not participate in
9 any plan or any agreement to do it. You
10 may find, on the other hand, that a
11 defendant agreed to commit an unlawful
12 act and yet he did not participate in the
13 actual doing of it. This all depends
14 upon your analysis and your view of the
15 facts and the evidence in this case.

16 You are entitled to consider any
17 exhibits which have been offered into
18 evidence. There are some exhibits,
19 however, which were merely marked for
20 identification and used by the lawyers
21 in cross examining the witnesses. Those
22 particular exhibits, for example, a
23 common thing, is the prior testimony of
24 a witness or the notes which an FBI
25 agent made of an interview. These kind

1 of things are not in evidence and will not
2 be sent to you in the jury room. As Mr.
3 Boreanaz pointed out in his summation,
4 if we had so many piles of paper, then
5 none of us would be able to get to the
6 corner of truth lurking at the bottom of
7 the pile, but you should consider all of
8 the testimony here in the case, the
9 direct and the cross examination to arrive
10 at your judgment on the facts.

11 During the course of the trial, it
12 is my job to rule on whether certain
13 questions should be asked or answered.
14 My decisions in this regard did not mean
15 that I favored one side or the other. It
16 merely meant that as to that particular
17 question, it was my judgment that because
18 of the rules of evidence or past decisions
19 of Courts, that the question should either
20 be answered or not be answered.

21 I will turn to some general consider-
22 ations which I will charge you in a
23 formal fashion and perhaps during this
24 time, we interpose with some comments
25 trying to point out how this general

1 charge applies to this particular case.
2 I know that probably this is not
3 necessary, but for your assistance, we
4 will give to you a verdict sheet which
5 you will simply mark after your determina-
6 tion here in this case of the verdict on
7 each count and as to each defendant.
8 Count 1, for example, is marked "conspir-
9 acy", and Count 2, "Title 18, Section
10 1955". We will also send to you a copy
11 of the indictment and you should keep in
12 mind, certainly, that this is here for
13 your guidance only so that you will know
14 what the defendants are charged with,
15 the time span, for example is important.
16 If a man commits, - is charged with a
17 criminal act, that occurred in July of
18 1965 and the Government proves a criminal
19 act in May of 1966, then the charge must
20 fail because the defendant is entitled
21 to know when he is charged with doing
22 a criminal act.

23 Furthermore, it is important that
24 you keep your eye upon the crime charged
25 in this particular case. If you believe,

1 for example, beyond a reasonable doubt
2 that the defendants committed other
3 criminal acts or that they threatened
4 or that they were involved in illegal
5 gambling in violation of the law of the
6 State of New York, but you find that
7 the other elements are not satisfied,
8 then you must acquit. If you find that
9 other criminal acts were committed here
10 not charged in the indictment, then you
11 must acquit. We are not here as social
12 reformers; we are not here to, let us say,
13 police all the activities going on in
14 Rochester. We are only here to determine
15 guilty or not guilty on these two
16 particular counts and it is important
17 that we keep our eye on what we are
18 supposed to do in a case like this.

19 In all criminal cases, it is
20 important that you find that whatever
21 act is done is done willfully; that it
22 is done voluntarily and intentionally
23 and with a specific intent to do something
24 the law forbids or with specific intent
25 to fail to do something the law requires

1 to be done. One aspect of this is
2 certainly that a man should not be
3 convicted of a crime merely because of
4 carelessness, even gross carelessness.
5 You must find that the acts were willful,
6 were done knowingly, and were done unlaw-
7 fully. That is, that he made up his mind
8 to violate the law and he did it. The
9 mere presence of a person at the scene
10 of a crime and knowledge that a crime is
11 being committed are not sufficient to
12 establish that the defendant committed
13 the crime or he aided and abetted in
14 the commission of the crime unless you
15 find, beyond a reasonable doubt, that the
16 defendant was a participant and not
17 merely a knowing spectator. Part of this,
18 and we will talk about that later in the
19 case, if a person was a mere player in a
20 game and he, under the elements charged
21 here, you do not find that he was an
22 actual participant in the crime, but only
23 that he was there as a player in the game,
24 would mean that you must acquit.

25 In this case, as you well know, we

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1 are concerned with the identification of
2 certain voices. You listened to the
3 testimony in this regard of a number of
4 witnesses. You heard, - we will start
5 from the rear end first. We had the
6 gentlemen who were in here who had heard,
7 they said, Mr. Gingello and Mr. Russotti
8 speak on other occasions. In determining
9 whether or not their opinion was a good
10 opinion that they gave as to certain
11 words that they heard on this tape record-
12 ing, were the words of Mr. Russotti,
13 Gingello or Mr. Russo, you should certain-
14 ly keep in mind the number of times in
15 the past when the witnesses had occasion
16 to speak or listen to the particular
17 individuals involved; how long the
18 conversations occurred; circumstances
19 of the conversation; whether the particular
20 spot was loud or noisy; whether it would
21 be under circumstances where there would
22 be some reason to keep in mind the voice
23 of these particular people. The passage
24 of time; - in this regard you can certainly
25 use your own good common sense as to the

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WESTERN DISTRICT OF NEW YORK

1 voice, loudness of the voice, the softness
2 of it as appeared in the tape to make a
3 judgment as to whether or not the
4 identification of a particular voice was
5 valid or not valid. This is certainly a
6 question for you to determine.

7 You should carefully consider the
8 argument of the lawyers in this regard,
9 but ultimately again, ladies and gentle-
10 men, as to whether or not the witnesses
11 who identified the voices did so fairly
12 and accurately is for your determination.

13 If a party offer weaker or less
14 satisfactory evidence when stronger or
15 more satisfactory evidence could have
16 been produced, you may view the offered
17 evidence with suspicion. You should keep
18 in mind, however, that the defendant is
19 not obliged to produce any evidence or
20 to call any witnesses at all. Throughout
21 all of this case, the burden remains upon
22 the prosecution to prove guilt beyond a
23 reasonable doubt.

24 The testimony of a person such as
25 Mr. Zito who provides evidence against a

1 defendant for pay or for immunity from
2 punishment or for personal advantage
3 or if you should find there was a personal
4 bias or some kind of indication here that
5 you must examine his testimony with
6 greater care than the testimony of an
7 ordinary witness. It is up to you to
8 determine whether or not the testimony
9 of any witness here was influenced either
10 consciously or sub-consciously. The
11 testimony of a person such as Mr. Zito
12 should be viewed with greater care. He is
13 a man who admitted being convicted of a
14 prior felony and you may take into account
15 his credibility in view of the commission
16 of other crimes that he admitted to.
17 Whether or not his testimony here, -
18 whether he was attempting to get favor
19 from the prosecutor or from the agents,
20 that is up to you to determine and to give
21 it such weight as you feel is proper in
22 assessing his testimony.

23 It is important for you to keep in
24 mind that the law does not compel a defend-
25 ant in a criminal case to take the witness

1 stand and testify and no presumption of
2 guilt may be raised and no inference of
3 any kind may be drawn from the failure
4 of a defendant to testify. You may not
5 discuss this fact, ladies and gentlemen,
6 in the jury room and you may not consider
7 it at all in your own private delibera-
8 tions. It is most important that you
9 do not take the failure of any of the
10 defendants here to take the stand against
11 them.

12 The burden of proving guilt of each
13 element of the crime remains upon the
14 Government. It does not shift to the
15 defendant. The fact that the number of
16 witnesses presented here, certainly it
17 is the quality. It certainly does not
18 make a difference. It is the quality of
19 their testimony which is important.

20 You ladies and gentlemen are not
21 obliged to accept testimony, even though
22 the testimony is uncontradicted and the
23 witness is not impeached. You may
24 decide because of the witness's bearing
25 and demeanor or because of the inherent

1 improbability of his testimony or for
2 other reasons sufficient to you as such,
3 that his testimony is not worthy of
4 belief. How much you want to accept of
5 the testimony of any witness, that is a
6 jury determination left to your good
7 common sense and conscientious dealing
8 with this particular case.

9 To constitute the crime charged in
10 the indictment, there must be a joint
11 operation of two essential elements,
12 an act forbidden by law and an intent to
13 do the act. Before a defendant can be
14 found guilty of a crime, the prosecution
15 must establish beyond a reasonable doubt
16 that under the statute described in these
17 instructions, the defendant was forbidden
18 to do the act charged in the indictment
19 and that he intentionally committed the
20 act. This repeats something I just said
21 to you a few minutes ago in a little
22 different way, but it is important.

23 As I have said to you before, that
24 the crime charged in this case is a crime
25 which requires proof of specific intent
 before the defendant can be convicted.

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1 Specific intent as the term implies
2 means more than the general intent to
3 commit the act. The Government to establish
4 specific intent must prove that the
5 defendant knowingly did an act which the
6 law forbids, purposely intended to
7 violate the law. The intent, neverthe-
8 less, may be determined from all the
9 facts and circumstances surrounding the
10 case.

11 An act is done knowingly if done
12 voluntarily and intentionally and not
13 because of mistake or accident or other
14 innocent reason. The purpose of adding
15 the word "knowingly" was to insure that
16 r one would be convicted for an act
17 done because of mistake or accident or
18 other innocent reason.

19 I will discuss in particular, later
20 in the charge, how this will apply in
21 particular fashion in this case.

22 As I have said to you a number of
23 times, you are here to determine your
24 verdict in this case from the evidence
25 in the case alone and not from anything

1 you have heard on the outside or other
2 experiences you have had in life or
3 what somebody has related to you. The
4 verdict here must be based only upon the
5 facts in this case and if you find
6 that the Government has failed to prove
7 beyond a reasonable doubt any essential
8 element as I have charged it to you, then
9 you have no other alternative but to
10 vote a verdict of not guilty as to that
11 particular charge.

12 It is evident as we go along here,
13 that I will repeat things from time to
14 time and I know you will be patient with
15 me because it is important that I say
16 it all and therefore, so I don't leave
17 anything out, I have found from past
18 experience, sometimes it is best to say
19 things twice, which drags it out un-
20 necessarily, but we must be sure that
21 all of the appropriate instructions are
22 given because they are important and
23 you should keep them all in your minds
24 when you are deliberating in the jury
25 room.

1 It is important also that during
2 the course of the trial, the jury selec-
3 tion, I told you other things here and
4 gave you other instructions and it is
5 important that you keep those instructions
6 in mind as well.

7 Certainly, in the case as we have
8 said again and again, it is up to you
9 to determine the facts in the case. The
10 main source of determining facts will be
11 from the testimony of the witnesses.
12 I have said to you that you should consider
13 direct examination, certainly, but also
14 cross examination. In a formal way, I
15 say to you that you, the jurors, are the
16 sole judges of the credibility of the
17 witnesses in this trial and it is up to
18 you to give to the testimony of the
19 witnesses the weight that you believe that
20 particular testimony deserves. In doing
21 this, you should carefully scrutinize
22 the testimony given, the circumstances
23 under which each witness testified and
24 every matter in evidence which tends to
25 indicate whether the witness is worthy of

1 belief. You should judge the witness's
2 intelligence, motive, state of mind,
3 demeanor and manner while on the stand.
4 You should judge any relation which the
5 witness may bear to either side of the
6 case; the manner in which the witness
7 might be affected by the verdict and the
8 extent to which, if, at all, the witness
9 is either supported or contradicted by
10 other evidence.

11 Of course, the mere fact that the
12 testimony of a witness is inconsistent
13 or that there are discrepancies in the
14 testimony, does not mean that you must
15 reject the witness's credibility. You
16 must determine whether the inconsistency
17 or discrepancy is the result of falsifi-
18 cation or whether, on the other hand,
19 it is the result of innocent miscalcula-
20 tion or inaccurate observation. A witness
21 may be inaccurate, contradictory and even
22 untruthful in some respects and yet be
23 entirely credible in the essentials of
24 his testimony. If you find that the
25 witness has lied, however, with respect

1 to any material portion of his or her
2 testimony, you may disregard that portion
3 which you find to be unbelievable or you
4 may. if you desire, disregard the entire
5 testimony of the witness. In evaluating
6 credibility, you will, of course, deter-
7 mine whether or not the testimony of a
8 given witness is inherently improbable
9 or contradictory with respect to any
10 material fact when you weigh it against
11 other evidence in the case.

12 You certainly, in determining facts,
13 as far as this case, if there are any
14 exhibits, - that is a thing which is
15 formal, a photograph or something like
16 that, you may consider that as well as
17 the testimony of the witnesses.

18 I have already told you about the
19 fact that testimony of a person such as
20 Mr. Zito must be accepted with care and
21 caution. How much weight should be
22 afforded to his testimony is for your
23 common sense and determination and you
24 certainly, in assessing his testimony,
25 you should look at the testimony of the

1 other witnesses in the case and see how
2 his testimony is either supported or
3 contradicted by that of other witnesses.

4 In any criminal case, as I have said
5 to you again and again, it is important
6 that no man be convicted unless you are
7 convinced of his guilt beyond a reasonable
8 doubt. What is a reasonable doubt? It
9 is a fair doubt based upon reason and
10 common sense and arising from the state
11 of the evidence. It is rarely possible
12 to prove anything to an absolute
13 certainty. Proof beyond a reasonable
14 doubt, therefore, is established if the
15 evidence is such as you would be willing
16 to rely and act upon it in the most
17 important of your own affairs. A defendant,
18 however, is not to be convicted on guess,
19 suspicion, conjecture or speculation.
20 A reasonable doubt may arise not only from
21 the evidence produced, but also from a
22 lack of evidence. Since the burden is
23 upon the prosecution to prove the
24 accused guilty beyond a reasonable doubt
25 of every essential element of the crime

1 charged, a defendant has the right to
2 rely upon failure of the prosecution to
3 establish such proof. A defendant may
4 also rely upon evidence brought out on
5 cross examination of witnesses for the
6 prosecution. Again, the law does not
7 impose upon a defendant the duty of
8 producing any evidence.

9 A reasonable doubt is such a doubt
10 as is based upon reason and as appeals
11 to your power of logic. It is a doubt
12 arising out of something tangible in the
13 evidence in the case or something lacking
14 in the case. It is a ~~doubt~~ which must
15 be distinguished from emotion or other
16 improper notions as I have explained to
17 you before.

18 If you feel uncertain and not fully
19 convinced that a defendant is guilty of
20 the crime charged and you believe you are
21 acting in a reasonable manner and you
22 believe a reasonable man or woman in a
23 matter of like importance would hesitate
24 to convict because of such a doubt as
25 you have, that is a reasonable doubt to the

1 benefit of which the defendant is
2 entitled. If you have such a doubt, you
3 must acquit.

4 The rule, however, that the Government
5 must prove every essential element of
6 a crime beyond a reasonable doubt, does
7 not mean that you must believe the testi-
8 mony of every Government witness as being
9 true beyond a reasonable doubt or that
10 every piece of evidence they have
11 offered is true beyond a reasonable
12 doubt. It means only that the credible
13 evidence as weighed and found by you
14 under my instructions and viewed as a
15 whole must establish every essential
16 element of the crime and a defendant's
17 guilt beyond a reasonable doubt.

18 I have already said to you before
19 and perhaps we should say it again because
20 it is in the context here of reasonable
21 doubt that it make sense. As I have
22 said to you, it is the absolute right
23 of defendants not to take the stand and
24 their failure to take the stand may not
25 be held against them in any way. Indeed,

1 you may not discuss it in your delibera-
2 tions and you may not consider it con-
3 sciously; how can I tell you subconscious-
4 ly, but you may not consider it against
5 the defendant privately in any way.
6 That is their absolute right not to take
7 the stand.

8 After you determine the facts in
9 the case, you may consider what we call
10 direct or circumstantial evidence. In
11 this regard, it is commonly stated that
12 direct evidence is what we sort of can
13 hear or see, what did a person say on a
14 particular occasion, what did he do, did
15 he run from one spot to another and did
16 someone see it. That is direct evidence,
17 but in assessing, in arriving at a
18 conclusion in this case, you may consider
19 not only direct evidence, certainly, but
20 also circumstantial evidence. Proof may
21 consist of the testimony of those who
22 witnessed a defendant's conduct and who
23 testified to that conduct during the course
24 of the trial. That is often termed
25 direct evidence. Although the Government

1 may not be able to produce eye witnesses
2 to the conduct upon which guilt depends,
3 this does not mean that it cannot produce
4 proof sufficient to support a verdict.
5 You are permitted to draw from one fact
6 the existence of another if reason and
7 experience support the inference. That
8 is to say, you may draw from facts which
9 you find to have been proven such
10 reasonable inferences as seem justified
11 by reason and in light of your own experi-
12 ences in life. Ladies and gentlemen,
13 the use of circumstantial evidence is
14 something we use all the time. In every
15 act of our day, we rely one way or
16 another upon circumstantial evidence.
17 When we go downstairs in the morning, we
18 turn the light switch on. There is no
19 way we absolutely know that light is
20 going on, but circumstantially because of
21 our past experience in life, we know
22 that when we turn the switch the light
23 will come on and we believe it will at
24 this particular time.

25 The facts, for example, and I hate

1 to bring up the snow question around
2 here, but certainly it is one that we
3 are familiar with and not in this
4 context, because I am talking of a
5 situation where there is no snow on the
6 ground and when you awaken in the morning
7 and you look out there is snow and you
8 did not see it snow, but because of the
9 circumstances, you then say with reason-
10 able reliance that you are correct that
11 it did, in fact, snow the evening before.
12 However, circumstantial evidence must be
13 carefully thought about because if you
14 were gone for several days, you could
15 tell indeed it did snow, but you could
16 not tell on what day it snowed unless
17 you had further information to base your
18 conclusion, but in any event, from facts
19 which have been proven, you may make
20 certain reasonable inferences and come
21 to certain reasonable conclusions which
22 you may consider in arriving at your
23 verdict.

24 Basically, an inference is nothing
25 more than a deduction or conclusion which

1 reason and common sense lead you to draw
2 from facts which have been proven. As I
3 have told you before, any inference which
4 you draw from the facts must reasonably
5 flow from the evidence and must be based
6 upon facts established by the evidence.
7 Since a permissible inference of law
8 must flow naturally and logically from,
9 and be based upon facts established by
10 the evidence, it follows that you may
11 not base further inferences merely on
12 inferences previously drawn.

13 If, in the course of your delibera-
14 tion, you find that certain evidence
15 admits equally of two inferences, one
16 pointing to guilt and the other pointing
17 to innocence, you must accept the infer-
18 ence supporting innocence. This, of
19 course, follows from our notion that
20 before you can convict any defendant, you
21 must find that he is guilty beyond a
22 reasonable doubt. In other words, he is
23 entitled to the benefit of a doubt.

24 You may consider as I said to you,
25 and find your verdict both on either
types of evidence, direct or circum-

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1 stantial. The law makes no distinction
2 between direct and circumstantial evidence,
3 but requires that before convicting a
4 defendant, that you be satisfied of the
5 defendant's guilt beyond a reasonable
6 doubt.

7 Ladies and gentlemen, at this time,
8 I will turn to a discussion of the
9 particular charges which are placed
10 against the defendants in this case.
11 You have heard the lawyers here discuss
12 the law and in my listening, it seemed
13 to me that from their point of view,
14 their side of the case that they have
15 done a good job. I think that you will
16 find that what I say about the law here
17 pretty much squares with what they said
18 to you about the law. I will go a little
19 bit further in some respects and try to
20 explain to you some of the details and
21 if you find any conflict between what
22 the attorneys said and what I say, it is
23 your job to accept the law as I charge
24 it to you just as if you find any
25 conflict between what the attorneys said

1 about the facts in the case and from
2 your finding of what the facts in the
3 case really are, then it is your judgment
4 on the facts which is controlling.

5 The statute here, Section 1955, I
6 will read it in the beginning here to you,
7 the pertinent part. You will find when
8 I charge you on the particular counts
9 that there are certain, - for a reason
10 which I will explain to you as we go, -
11 that there is part of this section on
12 Count 2, the substantive count with which
13 we are not concerned. The section
14 provides in part, - it is a very, very
15 long section and some of it absolutely
16 does not apply to our problem at all,
17 but the pertinent part reads as follows:

18 "Whoever conducts, finances, manages,
19 supervises, directs or owns all or part
20 of an illegal gambling business, shall
21 be guilty of an offense against the
22 United States."

23 When we go on to the (b), the sub-
24 section which defines certain words here,
25 "illegal gambling business" means a

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1 gambling business which, number one, is
2 a violation of the law of a state or
3 political subdivision in which it is
4 conducted. In this case, ladies and
5 gentlemen, we are concerned with the
6 law of New York State, which I will
7 explain to you in a few minutes. Illegal
8 gambling business, - secondly, this
9 particular element must be satisfied,
10 "involves" means a gambling business
11 which involves five or more persons who
12 conduct, finance, manage, supervise,
13 direct or own all or part of such a
14 business and thirdly, "has been or
15 remains in substantially continuous
16 operation for a period in excess of
17 thirty days or has a gross revenue of
18 \$2,000 in any single day". That is the
19 statute in which we are concerned.

20 I will discuss with you first the
21 Count 2. This is what we call the
22 substantive charge. That is it charges
23 the actual doing of the act in violation
24 of the law. Count 1 charges the con-
25 spiracy. That is the unlawful agreement.

1 I hope in charging on Count 2 first,
2 that I think it will make better sense
3 and I hope it will to you. At any rate,
4 Count 2 of the indictment, and the
5 indictment will be delivered to you so
6 I will summarize it for you for the most
7 part, Count 2 charges that continuously
8 between January 20, 1973 and April 20,
9 1973, the defendants Mr. Russotti, Mr.
10 Gingello, Mr. Russo and another man,
11 Paul Comfort who is not on trial here and
12 why he is not on trial is no concern of
13 yours, but he is not here, so we will
14 just address ourselves to these particular
15 defendants. That Mr. Russotti, Gingello
16 and Russo did, unlawfully, conduct,
17 finance, manage, supervise, direct and
18 own an illegal gambling business in the
19 form of an unlawful dice game which
20 violated the provisions of Article 225
21 of the Penal Law of the State of New York
22 and which involved more than five persons
23 unlawfully conducting the said dice game
24 and this was in violation of Section
25 1955 of Title 18 of the United States

Code.

1
2 You will note in Count 2 that the
3 Government charged that the game ran
4 continuously between January 20, 1973
5 and April 20, 1973. There was no charge
6 here in Count 2 that the game had a gross
7 revenue of \$2,000 in any single day and
8 because that was not charged on Count 2,
9 you may not consider how much money was
10 bet in any particular day. The defendants
11 are not charged with running a game on
12 Count 2 in which there was more than
13 \$2,000 played, so it is not an issue
14 before you.

15 In this particular count, in order
16 to establish an offense under this
17 section, the Government is required to
18 prove the following essential elements
19 beyond a reasonable doubt:

20 Firstly, that there was a gambling
21 business, an illegal gambling business
22 in the form of a dice game conducted in
23 the Western District of New York and in
24 Monroe County and it was conducted, as
25 I will continue to charge you, by the

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1 named defendants.

2 Secondly, that such gambling
3 business was in violation of the laws of
4 the State of New York. Under New York
5 Law, - I will explain to you New York
6 Law in a minute or so, and it will be your
7 determination as to whether the game here
8 violated New York Law. That is the first
9 thing that you must take up.

10 You must find that the gambling
11 activity, if you do find that it was
12 illegal, was in substantially continuous
13 operation for a period in excess of thirty
14 days. The words "substantially continuous
15 operation" do not mean that the game had
16 to be in operation each and every day,
17 but it must be that it was in substantially
18 continuous operation for a period in
19 excess of thirty days. What "substantially
20 continuous" means is ultimately for your
21 determination, but certainly, if you find
22 that it was only in operation every fifth
23 or sixth day, for example, would not be
24 substantially continuous operation. There
25 must be a period of time which the efforts

1 of the conductors of the game was
2 directed to having the game operate if
3 not every day, then at least on a regular
4 schedule. You have heard testimony in
5 this case that it was running sometimes
6 for five days or six days. If you should
7 find that and you should find that that
8 was over a period of thirty days, that
9 you could find that that was a substan-
10 tially continuous operation. I suppose
11 as all of us in our own work lives know,
12 we are entitled to a day off a week and
13 the same way that in your making your
14 judgment about substantially continuous
15 operation, you may find that it may make
16 sense to the operators of the game such
17 as this, that they take a day off a
18 week as well.

19 It does not matter whether the
20 business made a profit or whether it
21 lost money, if you find that it was a
22 gambling business. You must find that
23 five or more persons were involved in the
24 gambling operation as persons who con-
25 ducted, financed, managed, supervised

1 or owned all or part of the business.

2 To "conduct" means to act or carry
3 on or to play a role in furthering the
4 enterprise or to operate it or cause it
5 to function. If one is so engaged, the
6 extent of his role does not matter.

7 To "finance" means to make funds
8 available.

9 To "manage" means to run the
10 business or to have an important voice
11 in the direction of the business.

12 To "supervise" means to oversee or
13 give direction to the operation.

14 To "direct" means to control the
15 activities.

16 To "own" means to have title in
17 some demonstrable way to all or part of
18 the business such as sharing in the
19 profits or losses.

20 You keep in mind the arguments of
21 counsel as to what the activities were
22 of each of the defendants in this case
23 and certainly in keeping in mind their
24 arguments you refer back to the evidence
25 to determine whether or not any one of
the defendants here either conducted,

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1 financed, managed, supervised, directed
2 or owned.

3 A further note on the word "conduct".
4 The word "conduct" as used in the Federal
5 Gambling Statute means to carry on or to
6 operate or to cause to function and refers
7 both to high level bosses and low level
8 employees. It includes all level of
9 personnel who participate in an illegal
10 gambling business regardless of how minor
11 their roles and whether or not they are
12 called stick men, ladder men, kitchen men,
13 door men, dealers, box men. I will, in
14 a minute, however, make clear to you
15 that if a person is there as a mere
16 player, he may not be counted as one of
17 the five.

18 To determine whether or not there
19 was a violation of New York State Law,
20 the Section 225 of the Penal Law of the
21 State of New York is important. Sub-
22 section 2 referring to gambling says,
23 "A person engages in gambling when he
24 stakes or risks something of value upon
25 the outcome of a contest of chance or
a future contingent event not under his

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1 control or influence upon an agreement
2 or understanding that he will receive
3 something of value in the event of
4 certain outcome". Here we have the dice
5 game which you have had described to you
6 and whether it is a game of chance and
7 whether or not it violates the law of
8 the State of New York is for you to
9 determine.

10 Thirdly, "player" means a person who
11 engages in any form of gambling solely
12 as a contestant or bettor without
13 receiving or becoming entitled to receive
14 any profit therefrom other than personal
15 gambling winnings and without otherwise
16 rendering any material assistance to the
17 establishment, conduct or operation of
18 the particular gambling activity. A
19 person who gambles in a social game of
20 chance on equal terms with the other
21 participants therein does not, otherwise,
22 render material assistance to the
23 establishment, conduct or operation
24 thereof by performing without fee or
25 remuneration acts directed toward the

1 arrangement or facilitation of the
2 game such as inviting persons to play,
3 permitting the use of premises therefore,
4 and supplying cards or other equipment
5 used therein.

6 Subsection 4 talks about advance
7 gambling activity. A person advances
8 gambling activity when acting other than
9 as a player, he engages in conduct which
10 materially aids any form of gambling
11 activity. Such conduct includes but is
12 not limited to conduct directed toward
13 the creation or establishment of the
14 particular game, contest, scheme, device
15 or activity involved toward the acquisi-
16 tion or maintenance of premises, para-
17 fernalia, equipment or apparatus therefore
18 toward the solicitation or inducement of
19 persons to participate therein toward the
20 actual conduct of the playing phases
21 thereof, toward the arrangement of the
22 financial or recording phases or toward
23 any phase of its operation. One advances
24 gambling activity when having substantial
25 proprietary or other authoritative control

1 over premises being used with his knowledge
2 for purposes of gambling activity he
3 permits such to occur, continue or makes
4 no effort to prevent its occurrence or
5 continuation. A person profits from
6 gambling activity when other than as a
7 player he accepts or receives money or
8 other property pursuant to an agreement
9 or understanding with any person whereby
10 he participates or is to participate in
11 the proceeds of gambling activity.

12 There is a lot of this material
13 which is in the New York State Statute
14 which does not apply to this particular
15 situation at all. If you find, beyond
16 a reasonable doubt, that the dice game
17 was a game of chance and that it was run
18 as a business, that is, that the defendants
19 here or that the people who were involved
20 in the operation of the game, if you
21 should find that there was a profit
22 expected, then you could find that it was
23 a violation of New York State Law. As
24 I said to you before, if you should find
25 that a person was a player only, then he

1 could not be charged with a violation of
2 New York State Law.

3 It is not necessary for you to find
4 in this particular case that a defendant
5 was actually present during the operation
6 of the game; that he actually participated,
7 for example, as a box man, a ladder man
8 and so forth, because you must consider
9 the other aspects. If you should find
10 that there was a game that was an illegal
11 venture in New York State and that one
12 of the defendants was one of the five
13 persons who conducted, financed, managed,
14 supervised, directed or owned all or part
15 of such business and the other elements
16 of the particular crime are satisfied,
17 then you could find that the Government
18 has satisfied its burden.

19 There is a further note here which
20 you should keep in mind. In describing
21 the elements of the crime charged in this
22 indictment, - that is, as to this par-
23 ticular charge in Count 2, I have said
24 that defendants must have acted knowingly
25 and intentionally and you must find that

1 beyond a reasonable doubt. That means
2 with respect to each count of the indict-
3 ment that you must find that each defen-
4 dant knowingly, intentionally acted to
5 violate the law of New York State as I
6 have just described that law. That means
7 that the defendant must have known what
8 he was doing, that he was acting
9 voluntarily, deliberately or on purpose
10 and not because of mistake, accident,
11 carelessness or other innocent reason.

12 Certainly, the violation of this
13 section requires whether a man is present
14 or he is not present, that he knows of
15 the operation of the game; he knows it is
16 an illegal venture under New York State
17 Law and that he willfully and knowingly
18 desires the particular game to go forward
19 with a specific intent of violating the
20 law.

21 I will now turn to the charge on
22 Count 1 of the indictment which is the
23 conspiracy charge. As I have told you
24 before, the conspiracy has to do with the
25 illegal planning of a criminal act and

1 the second count has to do with the
2 illegal doing of the act. Certainly,
3 and this is true of many cases, that
4 I do not say that this is the case here,
5 but I say as an example, in some situations
6 to determine whether or not there was an
7 illegal plan, an illegal conspiracy, that
8 the jury may consider what happened,
9 what actually was done. In a bank robbery
10 case, for example, if the evidence is
11 that the robbery actually occurred and
12 the robbers made off with the funds to
13 determine whether or not there was a
14 conspiracy, the jury is entitled to take
15 into account the actual doing of the act.
16 In order to prove a conspiracy, the
17 Government has to bring in other evidence.
18 They have to prove either directly or
19 circumstantially that the defendants
20 met ahead of time and they planned. For
21 example, if they had a chart showing a
22 getaway route which could be taken as
23 some evidence that the defendants had
24 planned ahead of time, but the jury may
25 consider the actual doing of the act in

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1 determining circumstantially whether or
2 not there was an unlawful conspiracy.

3 In Count 1, during the same time
4 period, January 20th, 1973 to April 20,
5 1973, the grand jury charges the defendants
6 here as defendants and others, Joseph
7 Zito, Joseph Salerno, Sol Sharfstein as
8 co-conspirators but not indicted as
9 defendants and they also charge that
10 others did, unlawfully and knowingly,
11 conspire, combine and agree together
12 with each other to conduct, finance,
13 manage, supervise, direct and own an
14 illegal gambling business involving a
15 dice game which violated the provisions
16 of Article 225 of the Penal Law of the
17 State of New York and that all of this
18 was in violation, a conspiracy to violate
19 Section 1955 of Title 18.

20 The conspiracy also charges that
21 certain overt acts occurred. I will
22 read one of them to you. On April 9,
23 1973, Charles Russo and Paul Comfort
24 supervised the operation of a dice game
25 at 124 Webster Street, Rochester, New York.

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1 I will read a second, on April 12, 1973,
2 that Salvatore Russotti and Salvatore
3 Gingello met with Joseph Zito at 124
4 Webster Street, Rochester, New York.
5 The reason I read both was to again
6 emphasize to you that this is part of
7 the charge only and the fact that they
8 appear here in the indictment does not
9 in any way indicate any evidence at all
10 of the happening of these events.

11 The trouble with a conspiracy charge
12 is this, that the notion of conspiracy
13 on the surface is a very simple one, but
14 then when we get into the details of
15 how we are to consider the evidence, it
16 becomes a little sort of difficult.
17 Essentially, as both lawyers explained
18 to you, or all lawyers explain it to you,
19 that discuss it, the conspiracy charge
20 is the planning of an unlawful act in
21 violation of the particular count in the
22 indictment. You should keep in mind that
23 it does not charge an actual violation
24 of the Federal Statute prohibiting an
25 illegal gambling business. It charges

1 that each defendant conspired to violate
2 that section.

3 A conspiracy is a combination of
4 two or more persons, by concerted
5 action, to accomplish some unlawful
6 purpose or to accomplish a lawful purpose
7 by unlawful means. A conspiracy has been
8 described as a partnership in criminal
9 purposes in which each member becomes the
10 agent of every other member and the
11 gist of the offense is a combination or
12 agreement to violate or disregard the
13 law. Mere similarity of conduct among
14 various persons and the fact that they
15 may have associated with each other and
16 may have assembled together and discussed
17 common names and interests does not
18 necessarily establish proof of the
19 existence of a conspiracy.

20 However, the evidence need not show
21 that the members entered into any
22 express or formal agreement or that they
23 directly, by words spoken, or in writing,
24 stated between themselves what their
25 object or what their purpose was to be,

1 or the details thereof need not be
2 specified in detail or the means by which
3 the object or purpose was to be achieved.
4 What the evidence must show is that
5 members in some way or manner or through
6 some contrivance positively or tacitly
7 came to a mutual understanding to try to
8 accomplish a common and unlawful plan.

9 Again, ladies and gentlemen, we may
10 take into consideration not only what a
11 person actually said, but we also may take
12 into consideration what he actually did,
13 what he was observed doing to make a
14 determination whether or not there was a
15 conspiracy and whether or not a particular
16 defendant knowingly joined the conspiracy.
17 The evidence must establish to your
18 satisfaction that one or more of the
19 means or methods described in the indict-
20 ment was agreed upon to be used in an
21 effort to affect or accomplish some object
22 of the conspiracy as charged in the
23 indictment.

24 Again, ladies and gentlemen, we must
25 keep our mind on the charge. If you find

1 that the defendants conspired to violate
2 some other law, that is not before you.
3 If you do not find that they conspired
4 to violate this particular law at this
5 particular time, then you must acquit.

6 One may become a member of a
7 conspiracy without full knowledge of all
8 of the details of the conspiracy. On
9 the other hand, a person who has no
10 knowledge of a conspiracy, but happens
11 to act in a way which furthers an object
12 or purpose of the conspiracy does not,
13 thereby, become a conspirator.

14 Before you may find that a defendant
15 or another person, - that is a person not
16 charged as a defendant, - has become a
17 member of a conspiracy, the evidence must
18 show that the conspiracy was formed;
19 that the defendant or other person who
20 was claimed to have been a member knowing-
21 ly and willfully participated in the
22 unlawful plan with the intent to advance
23 or further some object or purpose of the
24 conspiracy. Again, we get back to the
25 notion that when a person is going to be

1 charged with a crime, you must show that
2 he did something willfully with knowledge,
3 with the specific intent to violate the
4 law.

5 To participate knowingly and willfully
6 means to participate voluntarily and
7 understandingly and with specific intent
8 to do some act the law forbids. That is
9 to say, to participate with bad purpose
10 either to disobey or to disregard the
11 law, so if a defendant with understanding
12 of the unlawful character of a plan
13 intentionally encourages, advises or
14 assists for the purpose of furthering
15 the undertaking or scheme, he thereby
16 becomes a knowing and willful participant,
17 a conspirator.

18 One who knowingly and willfully
19 joins an ongoing conspiracy is charged
20 with the same responsibility as if he
21 had been one of the instigators, as if
22 he had been one of the founders of the
23 conspiracy. In determining whether or
24 not a defendant was a member of a conspir-
25 acy, you may not consider what others

1 may have said or done. To determine
2 an individual's membership in a conspiracy,
3 the evidence must be established by his
4 own conduct, what he himself said or did.
5 However, participation in a conspiracy
6 may be proved from circumstantial
7 evidence produced relating to each
8 defendant separately.

9 In this case, ladies and gentlemen,
10 you will recall generally that Mr. Zito
11 testified about certain conversations
12 that he had with Mr. Russo and perhaps
13 with others concerning what Mr. Gingello
14 and Mr. Russotti did or did not do. You
15 cannot consider this testimony to deter-
16 mine whether or not Mr. Russotti or Mr.
17 Gingello were members of the conspiracy.

18 As I told you before, to determine
19 the facts, you must first assess the
20 credibility of Mr. Zito. If you do
21 believe what he had to say in any respect,
22 you may then, of course, consider what
23 Mr. Russo said to him, what Mr. Russo
24 did to determine whether or not Mr.
25 Russo was a member of the conspiracy and

1 became a member of the conspiracy will-
2 fully and knowingly.

3 You will recall, and Mr. Zito
4 testified about what Mr. Russotti and
5 Mr. Gingello did on particular occasions.
6 Whether or not they did the acts or not,
7 depends upon your view of the evidence,
8 your assessment of the evidence. For
9 example, generally speaking, whether or
10 not he actually saw Mr. Gingello make
11 some payoffs to some police officer;
12 whether he did or did not, that is for
13 your determination and if you find that
14 to be so, then it is your good judgment
15 to determine whether this act circum-
16 stantially shows that Mr. Gingello became
17 a member of a conspiracy.

18 You may also consider the evidence
19 of the conversation which you heard on
20 the tape and in which Mr. Zito related
21 to you his recollection of what Mr.
22 Russotti and Mr. Gingello said to him.
23 You may consider and you should remember
24 the lawyers, what they argued about,
25 their contentions, either side, as to

1 why certain words were said. There
2 may be some innocent reason or some
3 reason not involved. It may have had
4 to do with a threat, but it maybe did
5 not have anything to do with a conspiracy,
6 that is the conspiracy charged in this
7 particular case, the running of the
8 illegal dice game. It is up to you to
9 determine whether these conversations
10 occurred and what the conversations meant
11 and whether or not the conversations
12 pointed to knowledge and willful joining
13 of any conspiracy.

14 To move on, ladies and gentlemen,
15 in a formal sense, if and when it appears
16 from the evidence that a conspiracy
17 existed, and we take it step by step.
18 First you determine whether or not there
19 was a conspiracy. Then you determine
20 whether or not a person was a member of
21 the conspiracy and if you do determine,
22 find that he is a member from the evidence
23 in the case, then we go to the next step
24 and that is that if you determine a
25 defendant was one of the members, then

1 the acts thereafter knowingly done and
2 statements thereafter knowingly made by
3 any person likewise found to be a
4 member may be considered by you as
5 evidence in the case as to the defendant
6 found to have been a member even though
7 the acts and statements may have occurred
8 in the absence and without the knowledge
9 of the defendant, provided such acts or
10 statements were knowingly done and made
11 during the continuance of such conspiracy
12 and in furtherance of an object or purpose
13 of the conspiracy.

14 In other words, ladies and gentlemen,
15 if you find that Mr. Russo was a member
16 of the conspiracy and that Mr. Russo, -
17 and you find from independent evidence
18 in the case that Mr. Russotti or Mr.
19 Gingello was a member of the conspiracy,
20 and then again, we keep going back. We
21 are hearkened back to the assessment of
22 the believability of the witness, but if
23 you believe Mr. Zito and you believe what
24 Mr. Russo said to him about what Mr.
25 Russotti and Mr. Gingello said, and as

1 I have explained to you that you find
2 that they, by independent evidence, were
3 members of the conspiracy, that you may
4 consider these conversations, although
5 they are hearsay as part of the evidence
6 against Mr. Russotti and Mr. Gingello,
7 but you may only consider these conversa-
8 tions, - that is, these second-hand
9 conversations in the conspiracy count.
10 You may not consider, in any fashion,
11 the conversation that Mr. Russo had with
12 Mr. Zito in the second count. That is,
13 in the substantive count. You can only
14 consider it in the conspiracy count.

15 You may consider any admission or
16 incriminatory statement made outside of
17 court by a person. Ladies and gentlemen,
18 we will go back a minute. Any admission
19 or incriminatory statement made outside
20 of court by one person may not be con-
21 sidered as evidence against any person
22 who was not present and heard the state-
23 ment made. That certainly applies to the
24 substantive count, Count 2. You may
25 consider it under the restricted notion

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1 I gave to you on the conspiracy count if
2 you do find the other things to be proven
3 to your satisfaction.

4 In your consideration of the evidence
5 as to the offense of the conspiracy charge,
6 you should first determine whether or not
7 the conspiracy existed as alleged in the
8 indictment. If you conclude that such
9 conspiracy did exist, you should next
10 determine whether or not the accused
11 knowingly and willfully became a member
12 of the conspiracy. If it appears from
13 the evidence beyond a reasonable doubt
14 that the conspiracy was knowingly and
15 willfully formed as alleged in the
16 indictment and that the accused knowingly
17 and willfully became a member of the
18 conspiracy at the inception of the plan
19 or afterwards and that thereafter one or
20 more of the conspirators knowingly
21 committed in furtherance at an object
22 or purpose of the conspiracy, one or more
23 of the overt acts charged, then the
24 success or failure of the conspiracy to
25 accomplish the common object or purpose

1 is immaterial. Again, we are involved
2 in this with an illegal plan as we will
3 discuss in a minute. If you find the
4 elements are satisfied thus far, you
5 must also find that one of the conspira-
6 tors committed one of the overt acts
7 charged in the indictment.

8 By the term "overt act" is meant
9 any act committed by one of the conspir-
10 ators in an effort to affect or accomplish
11 some object or purpose of the conspiracy.
12 It may be an innocent act, a conversation,
13 making a phone call, driving an automobile,
14 It must, however, be an act which follows
15 and tends toward accomplishment of the
16 plan or scheme. It must be knowingly
17 done in furtherance of some object or
18 purpose of the conspiracy charged in the
19 indictment.

20 To sum up, in order to establish the
21 offense of conspiracy charged in the
22 indictment, the evidence must show beyond
23 a reasonable doubt that the conspiracy
24 described was formed and existing at or
25 about the time alleged.

1 Secondly, that the accused knowingly
2 and willfully became a member of the
3 conspiracy.

4 Thirdly, that one of the conspirators
5 thereafter, knowingly committed at least
6 one of the overt acts charged in the
7 indictment at or about the time and place
8 alleged, and fourth, that such overt
9 act was committed in furtherance of some
10 object or purpose of the conspiracy
11 as charged.

12 In this case, the indictment charges
13 the conspiracy existed from about January
14 20, 1973 until April 20, 1973. It is not
15 essential that the Government prove that
16 the conspiracy started or ended on or
17 about those specific dates. In other
18 words, if you find that the conspiracy
19 began a few days after January 20th and
20 ended even before the end, you may still
21 find that the charge has been satisfied.

22 Now, we will go back to some further
23 general notions here. You will note that
24 in both counts of the indictment, the
25 language reads, "conduct, finance, manage,

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1 supervise, direct and own an illegal
2 gambling business". It is not necessary
3 that you find that each person is guilty
4 of each and every one of these described
5 activities. If you find, from the
6 evidence, that a particular defendant
7 engaged in any one of the activities, -
8 that is, that he either owned or financed
9 or managed or supervised or directed or
10 conducted the illegal gambling business
11 in question, that will be sufficient to
12 convict even though that particular
13 defendant did not engage in the other
14 activities.

15 You certainly, in determining the
16 intent of a defendant, may determine that
17 intent not only from what he said, but
18 also from his conduct, his acts, his
19 statements and all the surrounding
20 circumstances.

21 In this case, ladies and gentlemen,
22 you are not required to find, and the
23 Government does not have to prove that
24 the defendants knew at the time that they
25 were violating this particular Federal
Law. The Government is required to

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1 prove on Count 1 that each defendant
2 conspired to break the law of New York
3 and that the other elements of the crime
4 existed, namely, that the plan involved
5 five or more persons, as I have described
6 to you and that the plan involved, -
7 that the dice game was to be in substan-
8 tially continuous operation for over
9 thirty days or that the plan involved that
10 the gross take was to be over \$2,000 in
11 any one day.

12 As far as Count 2 is concerned, it
13 is sufficient for the Government to prove
14 that each defendant had the specific
15 intent to break the law of New York as
16 I have described to you by taking part
17 in the dice game other than as a mere
18 player, and that the other elements of
19 the crime were satisfied, namely, that
20 there were five or more persons involved
21 as conductors, financiers, managers,
22 supervisors, directors or owners of the
23 illegal gambling business and that the
24 other element that the game was in
25 substantial continuous operation for over

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1 thirty days, but again, it is not
2 necessary, - I am just talking now about
3 the intent, about specific intent to
4 violate the law, - you must find that
5 they had the specific intent to violate
6 the gambling statute of New York State,
7 but you do not have to find that they
8 had particular knowledge of the Federal
9 Law that was involved. You must find that
10 all elements of the crime are satisfied
11 beyond a reasonable doubt.

12 This part of the charge is concerned
13 with knowledge of the defendants as to
14 the particular Federal Statute only.

15 You will note that in assessing
16 Count 1, - that is the conspiracy count, -
17 you may take into your consideration
18 whether or not there was a gross revenue,
19 the plan was whether there was a gross
20 revenue of over \$2,000 in any particular
21 day, but you may not take that evidence
22 into account in making your determination
23 as to Count 2, the substantive count.

24 In that connection, the term "gross
25 revenue" means the total amount bet with

1 the gambling operation. It does not
2 mean the net profit for the business.
3 In determining whether a gambling business
4 had a gross revenue of at least \$2,000
5 in any single day, you should consider
6 only whether the business accepted
7 \$2,000 or more in wagers or bets in any
8 single day.

9 In this case, ladies and gentlemen,
10 you have heard the testimony that Paul
11 Brana, an FBI agent, and Joseph Zito,
12 a Government informant, while acting in
13 undercover capacity, concealed the fact
14 of their employment by the Government
15 from the defendants. You have also heard
16 testimony, and again I emphasize, it is
17 up to you to determine the facts and my
18 review here does not mean that you must
19 determine any facts in the case as I have
20 indicated, but you have also heard testi-
21 mony that Special Agent Brana posed as
22 an underworld figure from New York City
23 and that the Government, through him and
24 Mr. Zito, supplied \$5,000 for the purpose
25 of funding the illegal gambling business

1 alleged in the indictment. As a result
2 of this activity, the defendants are
3 entitled to have the defense of entrap-
4 ment considered by you as to the charges
5 placed in the indictment.

6 In that connection, where a person,
7 where a person has no previous intent or
8 purpose to violate the law, but is induced
9 or persuaded by law enforcement officers
10 or their agents to commit a crime, he
11 is a victim of entrapment and the law,
12 as a matter of policy, forbids his con-
13 viction in such a case. On the other
14 hand, where a person already had the
15 readiness and willingness to break the
16 law, the mere fact that Government agents
17 provide a favorable opportunity or a
18 necessary ingredient for the commission
19 of a crime is not entrapment.

20 In this case, the mere fact that
21 Agent Brana supplied \$5,000 for the dice
22 game does not, by itself, amount to
23 entrapment. If you should find beyond a
24 reasonable doubt, from the evidence in
25 the case, that before anything at all

1 occurred respecting the alleged offense
2 involved in this case, the defendants
3 were ready and willing to commit crimes
4 such as are charged in the indictment,
5 whenever the opportunity was afforded
6 and the necessary funds were available,
7 and the Government agents did no more
8 than offer the opportunity to provide
9 the necessary funds, then you should find
10 that the defendants were not victims of
11 entrapment.

12 On the other hand, if the evidence
13 in the case should leave you with a
14 reasonable doubt whether the defendants
15 had the prior intent or purpose to commit
16 offenses of the character charged, apart
17 from the inducement or persuasion of some
18 Government agent, then it is your duty
19 to find him not guilty. Again, I repeat
20 that the defendant is not obliged to
21 offer any explanation at all here. He
22 is not obliged to offer any evidence
23 whatsoever. The burden remains upon the
24 Government to prove guilt beyond a reason-
25 able doubt and that burden remains in this

1 consideration, - that is in the considera-
2 tion of entrapment, just as it does with
3 any other aspect of this case.

4 Ladies and gentlemen, I have
5 explained to you that your verdict in
6 this case must be by unanimous vote.
7 You should take up each count separately
8 and each defendant separately. You
9 should only make up your mind in this
10 case because of whatever the facts are
11 that you find.

12 I will, at this time, ask you to
13 step into the corridor briefly so I can
14 consider any exceptions to the charge
15 or any particular requests to the charge
16 which the lawyers may desire to make and
17 then I will have you right back.

18 (Jury escorted from the courtroom.)
19

20 THE COURT:

Mr. Parry.

21 MR. PARRY:

22 No exceptions to the charge on behalf
23 of the Government, your Honor. I would
24 have one additional request. That is that
25 the jury receive some kind of instruction

1 as to how they should proceed mechanically
2 wit regard to the tape.

3 THE COURT: There would be no point in sending
4 the tape to them.

5 MR. PARRY: Right.

6 THE COURT: Because unless you have the machine,
7 you cannot use it, and Mr. Knisley points
8 out to me if you should pull the tape
9 out and finger marks or scratches may,
10 in some way, alter the tape, so that
11 the other exhibit is merely the dice.
12 I suppose we can tell them they can have,
13 but they are not to use in arriving at
14 their verdict. Should we send the dice?
15 They do have round edges. Mr. NeMoyer,
16 do you have any request or exception?

17 MR. NeMOYER: Yes, I do, Judge. First, I would
18 object to any reference to what they
19 can do with the tape. Your Honor, first
20 I object to the \$2,000 element being
21 included in the conspiracy count, Judge.
22 Your Honor, I object to the definition
23 of "gross revenue" as given by you,
24 Judge. I believe those cases stand for
25 different kinds of games. Your Honor,

1 I request that you charge, - my third
2 thing is that I request that you charge
3 that a dice game on private property in
4 New York State is not necessarily in
5 contravention of New York State Law.

6 THE COURT:

Let us take that up, Mr. NeMoyer.

7 MR. NeMOYER:

Yes, Judge.

8 THE COURT:

9 I think that what you say is true,
10 but I believe I have covered the
11 question sufficiently and I refuse to
12 charge further in regard to that in that
13 particular language.

14 MR. NeMOYER:

15 Well, I requested, Judge, I believe,
16 when I had Mr. Bervid on and you said
17 you would do it and it is my request.
18 Judge, next I take exception to the many
19 references, Judge, to "the conspiracy".
20 I thought there was many references to
21 "the conspiracy" instead of "alleged
22 conspiracy" and I object to that. Judge,
23 I request, - my last one is a request
24 that they be told they first must deter-
25 mine by independent evidence that there
was, in fact, a conspiracy before they
can consider against any defendant a

statement made by an alleged co-conspirator out of the defendant's presence.

THE COURT: All right. Mr. NeMoyer, I will charge that.

MR. NeMOYER: Thank you, Judge.

THE COURT: The conspiracy itself must be proven by independent evidence.

MR. NeMOYER: Thank you, Judge.

THE COURT: Mr. Boreanaz.

MR. BOREANAZ: Yes, your Honor. I join in the objections and/or exceptions or both, whichever we are supposed to do now with respect to the statements Mr. NeMoyer made. Specifically, however, I would like to just add very briefly on the question of gross revenue the objection or exception to the Court's charge deals with that aspect of it, wherein you defined it as the gross amount bet and I submit, under these circumstances, with the dice game in question, dice is a different form of gambling. In the cases that address themselves to that question, deal with bookmaking or policy plays or things of that sort, and I submit that

1 the proper approach would be simply to
2 submit to the jury the question of gross
3 revenue as set forth in the statute and
4 to allow the jury to determine what is
5 gross revenue, rather than to define it
6 in the fashion which the Court has, as
7 the gross amount bet, because I think
8 the status of the proof is such that there
9 is no way of determining what the gross
10 amount bet is.

11 THE COURT:

I refuse to elaborate further, Mr.
12 Boreanaz. I think that I again and again
13 insisted to the jury, during the course
14 of the charge, that the finding of any
15 fact was to them and whether or not the
16 money was bet certainly they would know
17 that that is a consideration of their
18 determination.

19 MR. BOREANAZ:

I have one request here, your Honor.
20 I ask the Court to instruct the jury the
21 testimony of Agent Brana is entitled to
22 no special treatment just because he is
23 an FBI agent; he should be viewed in the
24 same manner as any other witness and
25 they are at liberty to find him incredible

1 or credible as they see fit, without
2 regard to his status as an FBI agent.

3 THE COURT:

All right. I will charge that.

4 Mr. Walsh.

5 MR. WALSH:

The defendant Russo joins in the
6 requests and exceptions made heretofore.

7 THE COURT:

Fine. Do you have any suggestion
8 about what I should say about the tape?

9 MR. NeMOYER:

Say nothing, Judge.

10 MR. PARRY:

Well, the tape is in evidence. I
11 would suggest that the jury could be
12 told if they wished to hear the tape to
13 send a note out and they will be brought
14 up here and the tape will be played for
15 them.

16 MR. NeMOYER:

I object to that kind of pointed
17 instruction, Judge. I think they were
18 told - -

19 THE COURT:

I think I may do it the other way
20 and tell them that I have been informed
21 the only two exhibits in evidence are
22 the tape and the dice and that we do not
23 intend to send to the jury either one
24 unless there is a specific request for
25 it.

1 MR. NeMOYER:

Okay.

2 THE COURT:

Because I already told them that we
3 would send the exhibits, or perhaps I
4 should say nothing and not send either
5 one.

6 MR. PARRY:

I think the former approach that
7 you laid out, Judge, would be more
8 helpful to the jury in telling them how
9 to proceed.

10 THE COURT:

Mr. Boreanaz, Mr. Walsh, should I
11 say nothing?

12 MR. BOREANAZ:

That is my request, your Honor. I
13 think you have adequately covered it.

14 THE COURT:

I will say nothing. I think that
15 you, Mr. Parry, during your summation,
16 pointed out if they wanted to listen to
17 the tape, it would be here for them and
18 they could listen to it. The jury,
19 if they can make up their mind without
20 the tape, they can do it. I think in any
21 case that a decision by the jury should
22 be made from all the evidence in the case,
23 not from one particular incident that
24 happened, albeit, that the incident in
25 the view of both sides is an important

1 one for the jury's consideration. They
2 have been told that it is here, it is
3 available, but my experience in the past
4 is, if they need it, they will ask for it.
5 All right.

6 Have the jury come back, please.

7
8 (Jury returns to the courtroom.)

9
10 THE COURT:

11 Ladies and gentlemen, in your
12 discussion and your determination as to
13 whether or not a conspiracy was formed
14 at all, that fact, of course, must be
15 determined from independent evidence.
16 That means, it cannot be determined by
17 any hearsay. It has to be determined by
18 satisfactory independent evidence. That
19 is what people actually said or did at
20 a particular time.

21 In this case, we had the testimony
22 of Agent Brana. I told you, I explained
23 to you how you are to assess the credi-
24 bility of any witness in the case and
25 certainly, that rule applies to Agent
Brana as well as any other evidence. He

1 should not be given any special standing
2 by you because he is an FBI agent. If
3 you believe that cross examination brought
4 out certain points, that you find that
5 his direct examination is not believable
6 or ought to be discounted in a certain
7 way, then you should go ahead and do it.
8 If you find from weighing all the evidence
9 in the case, that his explanation of
10 certain things is lacking, then you should
11 discredit his testimony by that amount.
12 In other words, simply because he is an
13 FBI agent, does not give him any special
14 role or standing in this case.

15 At this time, will the Marshals
16 step forward, please, and be sworn.

17 (One male and one female Deputy
18 United States Marshals sworn as
19 custodians of the jury.)
20

21
22 THE COURT:

23 Mr. Smith, we want to thank you
24 for your willingness to be here and your
25 participation in this case, and you are
now excused and I understand that you

1 had a conversation with Mr. White before
2 about your job and it seems to me that
3 because of your service here, that you
4 have given, that we will excuse y from
5 further service. Thank you again. You
6 may go out and if you desire to talk
7 about it you can, but you do not have to.
8 It is up to you.

9 Ladies and gentlemen, you may now
10 go to the jury room and begin your deli-
11 berations in accordance with the instruc-
12 tions which I have given to you in this
13 case.

14
15 (Jury retires at 11:38 to commence
16 its deliberation.)

17
18 THE COURT: We will be in recess.

19
20 (Recess taken at 11:38 a.m.,
21 pending deliberation of the jury.)
22
23

24 * * * * *

1 PROCEEDINGS:

February 16, 1977, 2:50 p.m.

2 APPEARANCES:

As before noted.

3

(Defendant Russo present. Defendants

4

Russotti and Gingello not present.)

5

(Jury not present.)

6

7 THE COURT:

8

Mr. NeMoyer and others, the jury
has sent me a note. It is to the point.

9

It says, "One, ruling on entrapment".

10

It would seem to me that the jury is

11

concerned about the entrapment charge.

12

I do not know but I thought I would ask

13

them.

14

"Two, transcript (first day), Brana."

15

Was there a transcript made of Mr. Brana's

16

testimony? I doubt it.

17

MR. PARRY:

No, we requested none.

18

THE COURT:

19

I will tell them we do not have
transcript and then see what they want
to do.

20

21

22

(Defendants Russotti and Gingello

23

return to the courtroom.)

24

25

(Jury returns to the courtroom.)

1 THE COURT:

Ladies and gentlemen, I have a note
from you which is brief and to the point.
"Number one, ruling on entrapment". It
is not exactly clear to me what you want.
Do you want me to reread that portion of
the charge that has to do with entrapment?
That seems to be the consensus. I will
do that.

9 In this case, and I start off, I
10 preface my remarks again by saying that
11 if I discuss the testimony or the facts,
12 that does not mean that it is so because
13 I do not find the facts, you do, so that
14 it is up to you to determine what actually
15 happened, but in this case generally
16 speaking, you have heard testimony that
17 Paul Brana, an FBI agent, and Joseph Zito,
18 a Government informant, while acting in
19 undercover capacities concealed the fact
20 of their employment by the Government
21 from the defendants. You have also heard
22 testimony that Special Agent Brana posed
23 as an underworld figure from New York
24 City and that the Government through
25 Special Agent Brana and Mr. Zito supplied

1 \$5,000 for the purpose of funding an
2 alleged illegal gambling business which
3 is the illegal gambling business alleged
4 in the indictment. Again, whether or not
5 there was gambling, whether it was
6 illegal, that is something for you to
7 take up and in discussing this I have to
8 assume make certain assumptions.

9 As a result of this activity, the
10 defendants are entitled to an explanation,
11 a charge that they were victims of entrap-
12 ment as to the offenses charged in the
13 indictment. Where a person has no
14 previous intent or purpose to violate
15 the law but is induced or persuaded by
16 law enforcement officers or their agents
17 to commit a crime, he is a victim of
18 entrapment and the law as a matter of
19 policy forbids his conviction in such
20 a case. On the other hand, where a
21 person already has the readiness and
22 willingness to break the law, the mere
23 fact that the Government agents provide
24 a favorable opportunity or a necessary
25 ingredient for the commission of a crime

1 is not entrapment.

2 In this case the mere fact that
3 Agent Brana supplied \$5,000 for the dice
4 game does not by itself amount to entrap-
5 ment. If you should find beyond a
6 reasonable doubt from the evidence in
7 this case that before anything at all
8 occurred respecting the alleged offense
9 involved in this case, the defendants
10 were ready and willing to commit crimes
11 such as are charged in the indictment
12 whenever the opportunity was afforded and
13 the necessary funds were available and
14 that the Government agents did no more
15 than offer the opportunity and provide
16 the necessary funds, then you should
17 find that the defendants were not victims
18 of entrapment.

19 On the other hand, if the evidence
20 in the case should leave you with a
21 reasonable doubt whether the defendants
22 had the previous intent or purpose to
23 commit offenses of the character charged
24 apart from the inducement or persuasion
25 of some Government agent, then it is your

1 duty to find them not guilty. That is
2 as far as entrapment is concerned that
3 they were victims of entrapment.

4 Throughout all of this just in this
5 particular phase of the case just as in
6 any other phase of the case, the burden
7 of proving this kind, - these kind of
8 facts which are necessary for you to make
9 a judgment here is on the Government and
10 they must prove it beyond a reasonable
11 doubt. There is no burden of explanation
12 shifted to the defendant. He does not
13 have to offer proof of any kind. The
14 burden remains upon the Government.

15 As to the second question, "Transcript
16 (first day), Brana", ladies and gentlemen,
17 we do not have a transcript. Mr. Knisley
18 writes while the witnesses and the
19 attorneys and the Court speak, but he
20 does not sit down and type transcripts.
21 He cannot be in two places at once and
22 in fact in many trials it is not necessary
23 the transcript be prepared, so we do not
24 have transcript. I do not know whether
25 you wanted to take that to read or you

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wanted, - you were interested in having something read. Can you tell us what the problem is in this regard? Were you just interested in knowing whether there was a transcript of his testimony?

JUROR NO. 8:

No, no. There was a question on that.

THE COURT:

Can you go ahead? In any case certainly as far as making up your mind upon the facts in the case you should keep in mind that the judgment on the facts should be made from the testimony of all the witnesses in the case, not just one witness. That is true not only of any witness, but also of Mr. Brana, that his testimony is just one part of the whole mix in the case. As I have explained to you before, the mere fact that he is an FBI agent should not give his testimony any special standing or special worthiness of belief, let us say.

It seems preferable in any lawsuit if you can make your judgment up without reference to a particular part of the testimony of a particular witness. If

1 you cannot, however, then let me know and
2 we will make some arrangement to do
3 something about it. Excuse me, who is
4 the foreman here?

5 THE FOREMAN OF THE JURY: I am, sir.

6 THE COURT: I am sorry. I have forgotten your
7 name.

8 THE FOREMAN: Dominic Bueno.

9 THE COURT: Yes.

10 THE FOREMAN: I have another question I would like
11 to ask pertaining to everybody that is
12 not on that list, though.

13 THE COURT: Do you know what the consensus is
14 on Mr. Brana's testimony?

15 THE FOREMAN: I think after we discussed it for
16 a while, yes, I think we did straighten
17 it out. This was before lunch when we
18 went.

19 THE COURT: You think you have that straightened
20 out?

21 THE FOREMAN: Yes, sir.

22 THE COURT: All right. You want to ask another
23 question. Did you talk to the jurors
24 about this added question?

25 THE FOREMAN: This question?

1 THE COURT:

Yes.

2 THE FOREMAN:

Yes, sir.

3 THE COURT:

4 I think it best so we do not get
5 into something we should not that if you
6 will write the question out. Mr. Hoffarth,
7 can you give the juror a pad. Write the
8 question as you see it, as you believe
9 the consensus of the jury to be and then
10 I will take a look at it.

10

11

(The foreman of the jury wrote a
12 note which was then delivered to the
13 Court.)

13

14

15 THE COURT:

Ladies and gentlemen, the first
16 question, - the new question as your
17 foreman has written it to me is, "Count 1,
18 do the words 'conduct, finance, manage,
19 supervise, direct and own' mean all of
20 these or can it be any combination of?"

19

20

21

I will review briefly my charge on
22 this part of the case. As I told you,
23 in order to establish an offense under
24 Count 2 of violation of Section 1955, you
25 must find the following essential elements

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23

24

25

1 to be proven beyond a reasonable doubt
2 as to, of course, you must find that the
3 events occurred within the time explained;
4 that the defendants willfully and knowingly
5 committed the acts they are charged with
6 and the other elements which I have
7 explained to you, specific intent and so
8 forth in my main charge. You must find
9 that there was a gambling business in the
10 form of an illegal dice game conducted
11 at the time and place specified.

12 Secondly, that this dice game was
13 a gambling business as defined in violation
14 of the laws of the State of New York.
15 On Count 2 as I have already explained
16 to you, we are only concerned with
17 whether or not it was in substantial
18 continuous operation for a period in
19 excess of thirty days. The revenue part
20 of it does not apply to Count 2. You
21 must find beyond a reasonable doubt that
22 this alleged gambling activity, if you
23 so find it to be, was in substantial
24 continuous operation for a period in
25 excess of thirty days.

1 Fourth, you must find that five or
2 more persons were involved in the
3 gambling operations as persons who
4 conducted, financed, managed, supervised,
5 directed or owned all or part of the
6 business.

7 As I have already explained to you,
8 these are the, - it should read "conducted
9 or financed or managed or supervised or
10 directed or owned all or part of the
11 business". We have had the various
12 definitions here. To finance means to
13 make funds available. To manage means
14 to run it or have an important voice in
15 the direction of the business. To
16 supervise means to oversee or give
17 direction to the operation. To direct
18 means to control the activities. You do
19 not have to find that a defendant,
20 certainly, did each and every one of
21 these.

22 If you find the elements of the
23 charge are otherwise satisfied and if
24 you find that the defendant did one of
25 these, then you could find him guilty.

H. T. Noel & E. F. Knisley

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WESTERN DISTRICT OF NEW YORK

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As far as the five persons who were involved in the gambling operation, you do not have to find a person who conducted, financed, managed, supervised, directed or owned. You could find, for example, under particular facts in a particular case that the Government proved that the persons who they had evidenced against all financed a particular event. That would be sort of unusual because the people who act in more minor roles, - in this case we have heard testimony about people who were stick men, ladder men, kitchen men, door men, dealers, box men. Under the charge you recall I said to you in defining "conduct", under this particular statute that means to carry on or operate or to cause to function and refers to both high level bosses and low level employees. It includes all levels of personnel who participate in an illegal gambling business regardless of how minor their roles and whether or not they are called stick men, ladder men, kitchen men, door men, dealers or box men,

900

1 so that as far as the numbers that were
2 involved, if you find that indeed there
3 were these people who were described as
4 such and their numbers numbered more than
5 five and that they were an integral part
6 of the operation, then in determining
7 whether a defendant is guilty or not, you
8 could look at the other roles set forth
9 in the statute and if you find that any
10 one of the defendants, if all of the
11 other elements are satisfied here, financed
12 the game, managed it, directed it,
13 supervised it or owned it, then you may
14 find him guilty as charged so that I
15 suppose the simple answer to the question
16 to the words "conduct, finance, manage,
17 supervise, direct and own mean all of
18 these or can be any combination", and
19 the answer is it certainly can be in
20 combination.

21 Two, "On Count 2 is only the thirty-
22 day restriction involved". On Count 2
23 that is the substantive count and the
24 answer to that question is yes. If you
25 find all the elements of the crime charged,

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WESTERN DISTRICT OF NEW YORK

1 you also must find that the particular
2 game was in substantial continuous
3 operation for a period of at least thirty
4 days. If you find that it was not, you
5 may not consider the amount of revenue
6 in the game on Count 2 and if you find
7 that the game was not in substantial
8 continuous operation for thirty days or
9 more, even if you find the other elements
10 are satisfied, then your verdict must be
11 one of not guilty.

12 I think, ladies and gentlemen, I
13 have attempted to answer all your questions
14 and I hope now you can return to the jury
15 room and continue with your deliberations.

16 THE FOREMAN:

Thank you.

17
18 (Jury escorted from the courtroom.
19 Recess taken at 3:12 p.m. pending
20 deliberation of the jury.)
21
22

23 * * * * *

1 PROCEEDINGS:

February 15, 1977, 11:30 a.m.

2 APPEARANCES:

As before noted.

3 (Defendant Russo present. Defendants
4 Russotti and Gingello not present.)

5 (Jury not present.)

6
7 THE COURT:

8 Would you call upstairs and ask the
9 Marshal to bring Mr. Russotti and Mr.
10 Gingello down. While we are waiting for
11 Mr. Russotti and Mr. Gingello, it seems
12 that we could begin discussing some of
13 the points here that we must take up.
14 The first is as to the charge and whether
15 or not to charge on the \$2,000 a day.
16 Does anyone have anything further they
17 want to call to may attention on this?
18 I read the briefs. Mr. Parry, is there
19 anything further?

20 MR. PARRY:

I have nothing further, your Honor.

21 THE COURT:

22 This particular section, Section
23 1955, as we well know, charges that who-
24 ever conducts, finances, manages, super-
25 vises, directs or owns, all or part of
an illegal gambling business shall
constitute an offense against the United

1 States and as used in this section the
2 term "illegal gambling business" means
3 a gambling business which, one, is a
4 violation of the law of a state or
5 political sub-division in which it is
6 conducted. Two, involves five or more
7 persons who conduct, finance, manage,
8 supervise, direct or own all or part of
9 such business and, three, has been or
10 remains in substantially continuous
11 operation for a period in excess of 30
12 days or has a gross revenue of \$2,000 in
13 any single day. Then the statute continues
14 to define gambling and so forth.

15 It certainly appears that the
16 elements, essential elements of this
17 crime are that there be gambling; that
18 there be illegal gambling which is a
19 violation of State law or a law of a
20 particular political sub-division. In
21 this case we are involved with State law.
22 It is an essential element that five or
23 more persons either conduct or finance
24 or manage and so forth. It is apparently
25 an essential element that either the

22

1 business be in substantially continuous
2 operation for a period in excess of 30
3 days or it is an element that this
4 particular business has a gross revenue
5 of \$2,000 in any single day. It is not
6 necessary and our focus here is on this
7 third sub-paragraph. It is not necessary
8 that the Government prove each, that it
9 be in substantial continuous operation
10 or that it has a gross revenue of \$2,000
11 in any single day.

12 However, it appears to the court
13 that in many instances the prosecutor
14 may be well advised to charge either one
15 or the other. It may be that depending
16 upon what witnesses may be available to
17 him, for example. He may know that if
18 he has Tom Smith available as a witness
19 that Mr. Smith was at a particular place
20 and we will assume all of the other
21 essential elements were satisfied and he
22 was there every day for some 40 days or
23 more and so that as far as evidence under
24 those facts, he would be able to satisfy
25 the jury that the element of the 30 days

1 were satisfied.

2
3 (Defendants Russotti and Gingello
4 return to the courtroom.)

5
6 THE COURT:

7 However, he also may have a witness
8 who was not there. Maybe he was only
9 there for two or three days. The first
10 witness, let us assume, was a fellow who
11 was a door man or something like that and
12 he really did not know what the amounts
13 were that were being bet on the various
14 games. The other fellow was a participant
15 in the game and he was well aware of what
16 the bets were as to each roll, he had
17 one of those careful minds that can recall
18 who won and lost and how much was won and
19 lost so that under his testimony the
20 second part of the third element could be
21 readily satisfied.

22 In these cases I think as we are
23 aware of the trouble Mr. Parry had here
24 that certain witnesses did not appear
25 and I am not going to judge whether or
not their failure to appear was justified

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WESTERN DISTRICT OF NEW YORK

1 or not but they did not appear. In this
2 case here if witness one did not appear
3 then he could not prove the case under
4 the 30 days and if witness two did not
5 appear then he could not prove the money.
6 If one or the other, - if both appeared
7 then here it would seem to me that you
8 should have two counts, two separate
9 counts charged. Under the Price case,
10 certainly you could not sentence a fellow
11 for consecutive terms under this state
12 of the record because it all came out of
13 one set of facts.

14 I think that the cases of United
15 States against Stirone which was cited
16 in the briefs and I believe especially
17 in the case of Russell against United
18 States, which was not, which there the
19 Supreme Court discussed at great lengths
20 the need to set forth, and especially in
21 these statutes which are complicated.
22 They are not common law statutes but are
23 statutes where Congress has made some
24 particular series of events criminal
25 conduct.

1 In the Russell case, there the
2 Congress had made it a crime for a person
3 to refuse to answer questions when put
4 to him by a Congressional Committee on
5 subjects which were pertinent to the
6 inquiry. In these Russell cases and the
7 other cases the questions were put forth
8 but in the indictment there was nothing
9 said about what the question was that was
10 pertinent to the inquiry. There was
11 nothing said about what the committee
12 was trying to do and the Supreme Court
13 held that this was an essential element
14 of the crime being charged so that a man
15 would know what the problem was, what he
16 was faced with and so that the Government
17 could not, when they get into a case,
18 appear to start off on one theory and
19 then change their theory in mid-stream.

20 In this case here when you read the
21 indictment the time span is set out which
22 certainly charges more than 30 days. We
23 have here the fact that it is a violation
24 of State law. That is set out so that
25 the defendants clearly know that. We
have the fact that five or more persons

1 must be involved in conducting and so
2 forth. It is puzzling to the court, as
3 I understand it, that this indictment
4 had been amended because in the beginning
5 the business about five or more persons
6 was not included. That was included but
7 nothing was included about the money, the
8 gross monies that were involved, so as
9 far as the ruling of the court is this,
10 that as far as the charge here is concerned
11 that we will charge a violation in the
12 substantive count that it is an essential
13 element that it has been and remains in
14 substantial continuous operation for a
15 period in excess of 30 days and the
16 Government may not go under the theory
17 that there was gross revenue of \$2,000
18 in any single day .

19 I believe it is appropriate to say
20 now, however, that my reading of the
21 cases that come up under conspiracy,
22 there the Government I think, is given
23 a freer hand. When in any criminal
24 enterprise the contours of the plan are
25 very difficult to determine, - that is,

1 whether the game would be in effect for
2 more than 30 days, whether or not there
3 would be \$2,000 wagered. Certainly the
4 individuals involved in this scheme, the
5 more that is bet, theoretically the more
6 you can make in operation of the game,
7 theoretically, so that I believe that on
8 the conspiracy count that we will charge
9 that there must be a plan to involve an
10 illegal gambling business and that the
11 conspirators have to plan that their
12 operation would involve five or more
13 persons who conducted and so forth and
14 so on and the jury can find from the
15 circumstances that it had been or remains
16 in substantial continual operation for
17 a period in excess of 30 days or that
18 the plan at its inception would be that
19 there should be a revenue in excess of
20 \$2,000 in any single day but since we
21 are not involved with the completion of
22 criminal conduct that the jury if they
23 may take into account all the evidence
24 in the case to determine whether or not
25 the plan encompasses either 30 days or

1 encompassed a plan to have a gross revenue
2 in excess of \$2,000 in any single day.

3 I think there was some talk about
4 a specific intent here. Certainly the
5 Government must prove beyond a reasonable
6 doubt that defendants had the specific
7 intent to disregard or disobey the law;
8 that they had the specific intent to
9 gamble as a business in violation of the
10 law of the State of New York.

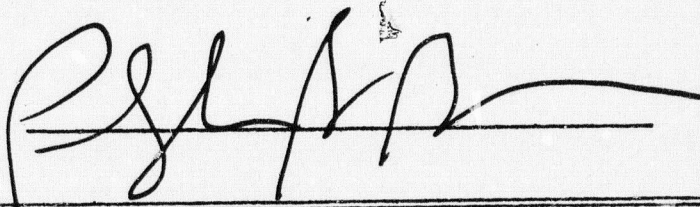
11 However, as far as putting the
12 burden on the Government to prove that
13 the defendant knew of this particular
14 Federal statute and knew that it was a
15 violation of Federal law if five or more
16 persons be involved in conducting and
17 so forth, I do not find that that is
18 part of the burden that is put upon the
19 Government or that the defendant must
20 know that it was a violation of Federal
21 law that the game be in substantial
22 continuous operation for a period of
23 time in excess of 30 days.

24 Before we proceed with summations,
25 is there anything else to take up?

CERTIFICATE OF SERVICE

July 1, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the ~~Western~~ District of New York.

A handwritten signature in dark ink, appearing to be "R. J. [unclear]", written over a horizontal line.